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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1694

BENJAMIN FRANKLIN FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation,

Petitioner,

vs.

DERENCO, INC., a Nevada corporation,

Respondent.

Brief of the State of California, the State of Iowa, the Commonwealth of Massachusetts, the State of Oregon and the State of Washington as Amici Curiae in Support of the Petition for a Writ of Certiorari

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I
Interest of Amici Curiae

The State of California and other states are currently involved in litigation in which federally chartered savings and loan associations contend that the state laws governing such matters as creditor-debtor relations, transfer of real property, restraints of trade and discrimination in lending cannot be applied to such institutions because of federal preemption. In many instances the Federal Home Loan Bank Board ("FHLBB") has appeared in these actions contending that such preemption

impliedly arises from federal statutes and expressly arises from FHLBB regulations.[1]

The FHLBB has by its regulations purported to divest the states from applying to federally chartered savings and loan associations laws protecting debtors,[2] regulating transfers of title to real property[3] and anti-discrimination in lending.[4]

Thus the issue as to whether the states can apply their real property, debtor protection, restraint of trade

[1]*People of the State of California, etc., et al. v. Glendale Federal Savings & Loan Ass'n etc., et al.*, Superior Court of California, County of Los Angeles No. C 147921; *Glendale Federal Savings & Loan Ass'n v. David H. Fox, etc., et al.*, U.S.D.C. (C.D. Cal.) No. CV-77-2374-WMB; *People of the State of California, etc., et al. v. West Coast Federal Savings & Loan Ass'n, etc., et al.*, Superior Court of California, County of San Mateo, No. 220012; and *Conference of Federal Associations, etc., et al. v. Richard T. Silberman, etc., et al.*, U.S.D.C. (C.D. Cal.) No. S-78-55-PCW. The State of Washington is also litigating whether that state's anti-discrimination in lending statutes and laws prohibiting restraints of trade have been preempted *Washington Savings League, et al. v. Bruce K. Chapman, et al.*, U.S.D.C. (W.D. Wash.) No. 78-1635; *In Re Great Western Union Federal Savings and Loan Ass'n*, Superior Court of Washington, County of Thurston No. 56262. The State of Iowa is contesting the issue of whether state laws prohibiting the conditioning of the extension of credit by a federally chartered savings and loan association on the sale of insurance (*i.e.*, an illegal tie-in arrangement between loans and the sale of insurance) have been preempted by the Federal Home Loan Bank Board's regulations. *Home Federal Savings & Loan Ass'n of Algona, Iowa v. Insurance Department of Iowa, et al.*, (8th Cir. 1978) 571 F.2d 423. The Commonwealth of Massachusetts is also litigating whether that state's laws dealing with payment of interest on impound accounts has been preempted by the FHLBB's regulations, *i.e.*, virtually the same issue as is before the court in the instant case. *First Federal Savings and Loan Ass'n of Boston, et al. v. Carol S. Greenwald, etc.*, No. 78-1155 (1st Cir.).

[2]12 C.F.R. §546.6-11(a), (b), (c) and (d) (1977).

[3]12 C.F.R. §545.6-11(f) and (g) (1977).

[4]43 Fed. Reg. 22,332 (1978) (to be codified in 12 C.F.R. §528).

and anti-discrimination laws to federal savings and loan institutions is presently in doubt. Amici curiae have a vital interest in a resolution of the issues in this action in order to be able to determine the scope and applicability of their laws.

Amici curiae believe that the unsettled state of the law, and decisions preempting state law have resulted in severe inequities to the citizens of California, Iowa, Massachusetts, Oregon, Washington and other states, have unnecessarily deprived debtors of the benefits of the states' consumer protection laws and will allow federal savings and loan institutions unfairly to take advantage of state laws involving real property while having immunity from other laws.

II
Statement of the Case

Respondent, Derenco, Inc., on behalf of itself and others, brought suit against petitioner, Benjamin Franklin Federal Savings and Loan Association, to obtain an accounting of the profits realized by petitioner on funds held in impound accounts which were established to pay taxes and insurance premiums on mortgaged residences. The petitioner had impounded these sums but had not paid interest nor accounted for their use. The trial court found that the petitioner was required to compensate the class for its use of these sums in an amount equal to that which petitioner paid on passbook savings accounts. The Oregon Supreme Court affirmed the trial court's findings up until the date of the enactment of regulations by the FHLBB dealing with payment of interest on impound accounts. The Oregon Supreme Court, without reviewing Congressional intent, considered the relevant FHLBB regulation

and disallowed the trial court's award of compensation after that date, apparently on the assumption that the regulations preempted state law.

III
Reasons for Granting the Writ

A. There Are Conflicts Between Judicial Authorities as to Whether There Is Federal Preemption With Respect to the Application of State Laws Concerning Real Property and Debtor Protection

The Oregon Supreme Court has, in this case, held that state law requiring interest on impound accounts as applied to federally chartered savings and loan associations is not preempted by any federal statute but may be preempted by FHLBB regulation. This decision appears to conflict with the holding in *First Federal Savings and Loan Ass'n of Boston v. Greenwald,* Nos. 3931-C and 77-76-C (D. Mass. filed Feb. 22, 1978). (See also *Federal National Mortgage Ass'n v. Lefkowitz,* (S.D.N.Y. 1975) 390 F. Supp. 1364 (3 judge, district court held that a New York statute requiring mortgage-lending institutions to pay interest on impound accounts was not preempted by federal laws governing the Federal National Mortgage Association).)

In *Meyers v. Beverly Hills Federal Savings & Loan Association,* (9th Cir. 1974) 499 F.2d 1145, the court held that state laws concerning prepayment penalties could not be applied to federally chartered savings and loan associations because of preemption. In *Garrett v. Coast and Southern Federal Savings & Loan Ass'n,* (1973) 9 Cal. 3d 731, the California Supreme Court reversed a trial court's decision sustaining a

demurrer to the complaint and held that defendant's late charge provisions in its mortgage loan contracts were void and unenforceable under state law. Since the defendant was a federally chartered savings and loan association, the court's decision impliedly held that there was no preemption.

In *Conference of Federal Associations, etc., et al. v. Richard T. Silberman, etc., et al.,* U.S.D.C. (C.D. Cal. No. S-78-55-PCW), a federal district court judge held in a memorandum of intended decision that California could not apply its anti-redlining (discrimination in lending based on neighborhoods) law to federally chartered savings and loan associations because of federal preemption. In *People v. Coast Federal Sav. & Loan Ass'n,* (S.D. Cal. 1951) 98 F. Supp. 311, the court suggested that state law could not be applied to federally chartered associations because the FHLBB had promulgated comprehensive regulations concerning all aspects of every savings and loan association "from its cradle to its corporate grave." Compare *Rettig v. Arlington Hgts. Fed. Sav. & Loan Ass'n,* (N.D. Ill. 1975) 405 F. Supp. 819 and *Kaski v. First Fed. S & L Ass'n of Madison,* (1976) 240 N.W.2d 367 with *Johnson v. First Fed. Sav. & Loan Ass'n of Detroit,* (E.D. Mich. 1976) 418 F. Supp. 1106; *Pearson v. First Savings & Loan Ass'n,* (Fla. App. 1963) 149 So.2d 891; *Oumon v. Allentown Federal Savings & Loan Ass'n,* (E.D. Pa. 1963) 218 F. Supp. 716. See also cases cited in FN. 1, *supra.*

Thus, there is great divergence in the opinions concerning if and to what extent the application of state law to federally chartered savings and loan associations has been preempted. As a result, every time a state or its citizens seek to enforce its laws with respect

to a federally chartered savings and loan association, litigation results. For example, the California Supreme Court has held that the ancient doctrine of prohibiting restraints on alienation precluded in certain instances the enforcement of "due on sale clauses" (acceleration of loans upon transfer of property). *Tucker v. Lassen Sav. & Loan Ass'n,* (1974) 12 Cal. 3d 629. Yet, federal associations and the FHLBB claim that even such traditional real property doctrines cannot be applied to real property transactions to which federally chartered savings and loan associations are parties. If the various cases stand for the proposition that the FHLBB can take over all aspects of state real property and lending laws vis-a-vis federal savings and loans under the doctrine of preemption, virtually all states and their citizens will be greatly affected.

B. The Oregon Court Opinion as Well as Others Have Been Read to Suggest, Erroneously, That a Federal Agency Can Preempt a Field Regardless of Congressional Intent

The suggestion that a federal agency such as the FHLBB can preempt an area without regard to Congressional intent is manifestly incorrect. The FHLBB has purported to enact such regulations preempting areas and has concluded it has the power to preempt. (See 12 C.F.R. §545.6-11 (1977) and Advisory Opinion of Federal Home Loan Bank Board in the matter of *Schott v. Mission Federal,* U.S.D.C. (C.D. Cal.) No. 75-366-WMB.)

Yet this Court has repeatedly stated that preemption is based on Congressional intent. Thus, this Court recently stated:

> "It is uncontested that whether the [state] statute is invalid under the Supremacy Clause de-

> pends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.' Retail Clerks v. Schermerhorn (1963), 375 U.S. 96, 103. Often Congress does not clearly state in its legislation whether it intends to preempt state laws; and in such instances, the courts normally sustain local regulation on the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States. Ray v. Atlantic Richfield Co. (1978) ..... U.S. ....., ...; Jones v. Rath Packing Co. (1977) 430 U.S. 519, 525, 540-541; Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230."

E.I. Malone, Commissioner of Labor and Industry for Minnesota v. White Motor Corporation and White Farm Equipment Company, (1978) ..... U.S. ....., 46 L.W. 4295.

A basic principle of administrative law is that agencies charged with the implementation of a statutory scheme may not promulgate regulations which go beyond the scope of their Congressional mandate. *E.g., Morrill v. Jones,* (1882) 106 U.S. 466. All such regulations are void and unenforceable. *Merritt v. Welsh,* (1882) 104 U.S. 694, 704. Accordingly, in the instant case the Board's regulations are invalid to the extent they purport to provide for preemption in areas not preempted by Congressional legislation.[5]

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[5]It should be noted that a Congressional Committee recently noted the Board's rulings that federal savings and loan associations do not have to comply with state laws "even in those

(This footnote is continued on next page)

It is important to recognize that the courts "[s]tart with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, (1946) 331 U.S. 218, 230. *Accord, People v. Conklin,* (1974) 12 Cal. 3d 259, 265, 114 Cal. Rptr. 241, 522 P.2d 1049. "This assumption provides assurance that 'the federal-state balance,' United States v. Bass, (1971) 404 U.S. 336, 339, 30 L.Ed. 2d 488, 92 S.Ct. 515, 523, will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, (1977) 430 U.S. 519, 526.

Thus, preemption will be found only if Congress has "unmistakably . . . ordained" (*Florida Lime & Avocado Growers, Inc. v. Paul,* (1963) 373 U.S. 132, 142) its existence either explicitly or implicitly. This is to be determined only after a thorough analysis of the statute's structure and purpose. *Burbank v. Lockheed Air Terminal,* (1973) 411 U.S. 624; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* (1973) 414 U.S. 117; *New York State Dept. of Social Services v. Dublino,* (1973) 413 U.S. 405.

C. None of the Cases Have Adequately Considered Legislative Intent

The Oregon Supreme Court properly concluded that federal law did not preempt the field, at least until recent regulations were purportedly promulgated. But

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cases where the state law affords the borrower with a greater degree of protection." S. Rep. No. 93-902, 93rd Cong. 2d Sess. (June 4, 1974), reprinted in [1974] U.S. Code Cong. & Ad. News 6119, 6130. The Committee then stated, "During the Committee's consideration of this issue, some doubt was expressed that the Bank Board has the authority to preempt state law by regulation . . ." *Id.*

no court has examined the legislative history of the Congressional legislation nor the other critical factors to determine if Congress intended that there be pre-emption in this area.

At the outset, it is important to recognize that there is no express preemption. Thus, the federally chartered savings and loan associations and FHLBB have attempted to imply preemption from the Home Owners Loan Act of 1933 ("HOLA") (12 U.S.C. §§1461, *et seq.*). This Court has recently stated that it "is generally reluctant to infer pre-emption . . ." *Exxon Corporation v. Maryland,* (1978) .... U.S. ...., 46 L.W. 4666.

The Congressional orientation toward local needs which is manifest in HOLA was expressed during the Congressional hearings on HOLA conducted by the United States House Committee on Banking and Currency. On April 20, 1933, the Chairman of the Board, William F. Stevenson, elaborated on the Board's authority to prescribe regulations in order to accommodate differing state law systems:

> ". . . but they will be building and loan associations of the most approved type, which will be put into effect by regulations. A good many people think we ought to put all the state regulations, what they ought to do and all that kind of thing, in here. But that is left to regulation by the board, who will put the most expert building and loan authorities on it to provide those regulations, *so that the regulations can be varied. In some states you have to deal with them one way and in some other states another way, and we want the latitude allowed to fit the regulations of the board and the associations to the state law and the different needs.*" Hearings on HOLA, H.R.

4980, before House Comm. on Banking and Currency, 73rd Cong. 1st Sess. 7 (April 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board).

And, further,

"These associations will be federally [sic] chartered and the regulations as to how those things will be done are drawn by the board and put into effect. But they would be very careful, I should say. I know I would as a member of that board, *be very careful in authorizing them to do things that they were not authorized to do under state law. I do not think that would be our policy.*"

Hearings on HOLA, H.R. 4980, House Comm. on Banking and Currency, 73rd Cong. 1st Sess. 23-24 (April 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board).

As the Chairman of the Bank Board testified, as quoted above, the Board needed discretion to regulate because it needed to fit the federal associations to diverse local laws and needs. Since the federal associations were, by federal statute, to be set up on a uniform charter and structure, to be inspected and disciplined by the Board (12 U.S.C. §1464) and also by federal statute, to be subject to the state usury laws (12 U.S.C. §1425), Stevenson's statement can have but one meaning: even though each federal association would be identical to the next in its internal organization and Board superintendence, the Board needed the elastic authority to write regulations which could account for differing state law on, *inter alia*, transfers of title, recording, liens, taxation, priorities,

and contract rights, *either by being generally permissive, or by being tailored to state law*. And the Board got exactly what it asked for: "The board is authorized under such regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations. . . ." HOLA §5(a), 48 Stat. 128, 132 (1933), 12 U.S.C. §1464(a).

Furthermore, it is apparent that Congress, by *statute*, and not by delegation to the Board, decided the ways in which federal associations were to deviate from state practices. For example, Federal law exclusively governs, and has since HOLA's inception, the geographical radius in which federal associations may lend money, and the percentage of value of the security on which federal associations may lend. HOLA §5(c), 48 Stat. 128, 132 (1933) (current version at 12 U.S.C. §1464(c)). None of the express statutory deviations, however, impinge on the state laws on the rights of mortgagees and none involve preemption in the sense of displacement of state law.

Nothing in the statute or the hearings states or even suggests that Congress authorized the Board to regulate federal associations in such a way as to deprive borrowers of their state law rights with respect to mortgages, or indeed to preempt any state law governing security interests. Moreover, other than the language cited in the hearings (*supra*) there is no record of debate on whether the FHLBB would have the power to preempt state substantive law on the rights of borrowers.

Thus, the statute, by negative inference, and the legislative history, by the positive statements of the drafters, reveal that the purpose of the statute was

to promote home ownership by providing access to long term funds. Implementation of this purpose did not require that Congress give the Board authority to write a uniform federal law governing borrowers' interests in contracts made with federal associations. Absent such a need, the Congressional intent to preempt cannot be presumed. *Rice v. Santa Fe Elevator,* (1946) 331 U.S. 336, 349.

HOLA gave the Board discretion to facilitate federal associations' compatibility with local law, and that discretion is Congress' *limitation* on the Board's authority. It is categorically not the authority to preempt. A reading of HOLA shows a comprehensive structure for chartering associations, and disciplining the associations and their staff, as well as a set of lending practice rules on value of security allowed, upper limits on loans, etc. In other words, the statute deals specifically only with the *internal* affairs of federal associations. Nothing, however, appears in the statute which creates or regulates such external matters as borrower's rights. In fact, as recently as 1975, Judge (now Justice) Stevens, writing for the Seventh Circuit, recognized that whether the court should imply a private cause of action under the statute and regulations in favor of the borrower was itself an issue. *Goldman v. First Federal Savings and Loan Assn.,* (7th Cir. 1975) 518 F.2d 1247, 1250, n. 6. In short, the clear purpose of Congress in enacting HOLA was to preempt only a limited field of operation. See *Kelly v. State of Washington, supra,* (1937) 302 U.S. 1, 10 and *DeCanas v. Bica, supra,* (1974) 424 U.S. 351, 360. Thus, state laws governing borrower's rights have not been either explicitly or implicitly preempted and are therefore applicable to federal chartered associations.

Furthermore, the existence of a long standing federal policy deferring to State laws governing contract interpretation and real property mortgages demonstrates that Congress did not intend to preempt state regulation of such transactions by enacting HOLA.

This concept was expressed in *United States v. Little Lake Misere Land Co.,* (1973) 412 U.S. 580.

> "It is true, too, that '[t]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155, (88 L.Ed. 635, 64 S.Ct. 474] (1944).' Even when federal general law was in its heyday, an exception was carved out for local laws of real property. Swift v. Tyson, 16 Pet. 1, 18 [10 L.Ed. 865] (1842); see Kuhn v. Fairmon Coal Co., 215 U.S. 349, 360 [54 L.Ed. 228, 30 S.Ct. 140] (1910). Indeed, before Erie R. Co. v. Tompkins, supra, this Court's opinions left open the possibility that even 'the United States, while protected by the Constitution from discriminatory state action, and perhaps certain other special forms of state control, was nevertheless governed generally in its ordinary proprietary relations by state law.' Hart, The Relations Between State and Federal Law, 54 *Col.L.Rev.* 489, 533 (1954); See, e.g., Mason v. United States, 260 U.S. 545, 558 [67 L.Ed. 396, 43 S.Ct. 200] (1923)." *United States v. Little Lake Misere Land Co.,* (1973) 412 U.S. 580, 591-592.

The scope and direction of HOLA, seen in relation to federal policy expressed in *Little Lake Misere* reveals

that the federal government has not occupied the field of local land agreements by providing a federal framework for the structure and rules of a federally regulated lending institution. The Board, therefore, cannot claim to have the authority to intrude into an area which Congress, following the policies of federalism expressed by the Tenth Amendment, has left alone.

D. A Federally Chartered Savings and Loan Association Cannot Selectively Take Advantage of Those State Laws That Are Favorable and Refuse to Be Bound by Those That Are Unfavorable

By claiming immunity from the state law involving mortgages, while at the same time invoking and taking advantage of other state laws, federally chartered savings and loan associations are in effect asserting the right to pick and choose those parts of state law which it will allow to be applied. Such selectivity cannot be permitted.

The notion that a litigant can "pick and choose what portion of the law binds him" was properly rejected in the leading case of *First National Bank of Logan, Utah v. Walker Bank & Trust Co.,* (1966) 385 U.S. 252, 261. That case arose under a provision of the National Bank Act that permitted national banks to establish outside branches if such branches could be established by state banks under state law. The Supreme Court held that a national bank in Utah was not permitted to establish a new branch in the same city without taking over an existing bank, in view of a Utah statute permitting branch banking within the same city only to the extent that the proposed branch takes over an existing bank. Mr. Justice Tom Clark stated, at 385 U.S. 261 (emphasis added):

> "The Comptroller argues that Utah's statute 'expressly authorizes' state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. *It is a strange argument that permits one to pick and choose what portion of the law binds him.* Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there 'only to the extent that the State laws permit branch banking.' Utah clearly permits it 'only to the extent' that the proposed branch takes over an existing bank."

Mr. Justice Clark's language disapproving a litigant's being permitted "to pick and choose what portion of the law binds him" has been quoted by several federal cases, including *First National Bank of Fairbanks v. Camp,* (App.D.C. 1972) 465 F.2d 586, 592-93; *First-Citizens Bank v. Camp,* (4th Cir. 1969) 409 F.2d 1086, 1091, rejecting the Comptroller's contention that, in resorting to North Carolina state law, he was bound only by state capitalization and state location requirements, but that he was not bound by North Carolina's "need and convenience" and "solvency of the branch" criteria [affirming *First Citizens Bank v. Camp,* (E.D.N.C. 1968) 281 F.Supp. 786, which also quoted Justice Clark, at 281 F.Supp. 789]; *Dickinson v. First National Bank in Plant City, Florida,* (5th Cir. 1968) 400 F.2d 548, 553; *Bank of Laurel, Laurel, Mississippi v. Bloom,* (S.D. Miss. 1977) 426 F. Supp. 495, 497; *Grenada Bank v. Watson,* (N.D. Miss. 1973) 361 F. Supp. 728, 733; *First Citizens*

Bank v. Southern National Bank of North Carolina, (E.D.N.C. 1971) 329 F. Supp. 186, 189; *First National Bank of Catawba County v. Wachovia Bank,* (M.D.-N.C. 1971) 325 F. Supp. 523, 526; and *Industrial State Bank v. Camp,* (W.D. Mich. 1968) 284 F. Supp. 900, 902, rejecting the Comptroller's contention that the provision of the Michigan Financial Institutions Act requiring the state banking commission to be satisfied as to necessity for the establishment of a branch and the prospects of its successful operation were not binding as to him.

Amici emphasize that these cases are not cited for their specific holdings as to the application of state law to branch banking (which was mandated, as to national banks, by Act of Congress), but rather for their general statement and application of the principle that a litigant may not "pick and choose what portion of the law binds him".

Similar principles were stated by Mr. Justice Brandeis in *Buck v. Kuykendahl,* (1925) 267 U.S. 307, 316-17:

> "[O]ne cannot in the same proceeding both assail a statute and rely upon it. *Hurley v. Commissioner of Fisheries,* 257 U.S. 223, 225, 42 S.Ct. 83, 66 L.Ed. 206; Compare *Wall v. Parrot Silver & Copper Co.,* 244 U.S. 407, 411, 37 S.Ct. 609, 61 L.Ed. 1229. Nor can one who avails himself of the benefits conferred by a statute deny its validity. *Pierce Oil Co. v. Phoenix Refining Co.,* 259 U.S. 125, 42 S.Ct. 440, 66 L.Ed. 855; *St. Louis Co. v. Prendergast Co.,* 260 U.S. 469, 472, 43 S.Ct. 178, 67 L.Ed. 351."

Here a federally chartered institution must not be permitted to avail itself of the benefits of the state law of mortgages (foreclosures, titles, recording statutes, etc.) while at the same time refusing to be bound by those portions of that law which it finds distasteful to it.

IV
Conclusion

For all of the foregoing reasons, the State of California urges the Court to grant the writ.

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Respectfully submitted,

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